APPENDIX

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

No. 95-353-B-A

ALLISON DEAS

versus

RIVER WEST, L.P.,
ALTERNATIVE ADDICTION TREATMENT CONCEPTS, INC.,
STROTHER P. LINDSEY-DIXON AND PEGGY JARREAU

EXCERPTS FROM THE DEPOSITION OF STROTHER P. LINDSEY-DIXON TAKEN ON SEPTEMBER 18, 1996

* * * *

[5] DR. STROTHER P. LINDSEY-DIXON, 11934 COURSEY BLVD., BATON ROUGE, LOUISIANA, 70816, having been first duly sworn, was examined and testified as follows:

EXAMINATION BY MR. RASTANIS:

Q. Dr. Dixon, would you explain to me please why Ms. Deas was terminated.

A. Ms. Deas was terminated, in my medical opinion and my opinion as a former disability determinations officer, that her seizures were out of control, and I felt that it would be dangerous for her, and a danger to the patients that I intended to admit on the unit, to have her as an employee.

Q. What led you to believe that her seizures were out of control?

A. Because I saw her have a seizure during the orientation period.

Q. Okay, and tell me about that.

A. I was giving a presentation to the employees, and I noticed Ms. Deas turned her head very automatically to one side. And her head stayed that way for several seconds and the facial expression was blank. I called her name, and she did not respond. Then she turned her [6] head back around and I asked her if she were all right, and she said that she was. But then she asked me a question that had nothing to do with the content of the presentation.

Q. What did she ask?

A. She asked how did one evaluate a brain tumor.

Q. And did you answer her?

A. I told her that was not a question that was appropriate at the time.

Q. And how did she respond?

A. She didn't say anything.

Q. And you diagnosed her at that point in time?

A. I knew that something was wrong with Ms. Deas at that point in time.

Q. Okay. And when did you determine that was a seizure?

A. I felt it was a seizure at that point in time.

Q. Okay. So you made the decision that she had suffered a seizure in your presence?

A. Yes.

Q. What, a petit mal seizure?

A. A petit mal seizure, one does not necessarily lose consciousness, but awareness; and they don't have a general jerking and spasmodic reaction throughout the body, but they are not aware of their surroundings. And [7] they may move their head or face in a certain way for a certain length of time and not be aware of their environment for a few seconds.

Q. And you believe this is what was happening to Allison?

A. Yes.

Q. That she was not aware of her surroundings?

A. Yes, at that point in time.

Q. Okay. Now would you explain to me what you consider basic life or major life functions. What's a major life function to you?

A. That one can walk and talk, that one can stretch and lift within reason, can climb, those kind of activities.

Q. How about being aware of your surroundings?

A. Yes, indeed.

Q. So, being able to be aware of one's surrounding you would consider a major life activity?

A. I would.

Q. And when Allison was unable—in your opinion, what you perceived, is she was unable to be aware of her surroundings; is that correct?

A. Yes.

Q. So she had an impairment of a major life function in your opinion; isn't that correct?

[8] A. Well, she had an impairment, yes.

Q. Of a major life activity, being aware of your surroundings?

A. Being aware of one's surroundings.

Q. You say in your affidavit that you've recently done, it says, in my medical opinion and based on my experience as a Social Security disability examiner, Ms. Deas' seizures did not substantially limit her ability to work by limiting any of her major life activities. It seems inconsistent with what you just said. Can you explain that?

A. Well, in general I was speaking of being physically capable of walking, stretching, those kinds of activities.

Q. But you don't think that she was capable of always having awareness, right?

A. I do not think she was capable of always having awareness.

Q. Okay. Did you tell Mr. Ferrelli that you were uncomfortable with somebody having seizures on your unit?

A. I don't think I told Mr. Ferrelli that, no.

Q. Had you told anybody that you were uncomfortable with it?

A. I told Ms. Miller I felt it was dangerous with someone with seizures out of control to work on such a [9] unit, yes.

Q. What makes you believe that her seizures were out of control?

A. Because she had two in one day.

Q. And how do you know that?

A. Because one of the employees came to me very reluctantly and unsolicited and told me that he hated to say this, but felt that it was dangerous. And he wanted me to know that she had had a seizure in his presence.

Q. And how did he explain it to you?

A. That she lost awareness and that he called her name and she did not respond, and that went on for quite sometime. And then he told—he asked her, do you know that you had a seizure. And she responded that she knew that she had a seizure disorder, yes.

Q. So now you're saying that he asked her about it and she admitted it now?

A. Yes.

Q. He told you that?

A. Yes.

Q. And who was that?

A. Lane Douglas.

Q. What kind of qualifications does Lane Douglas have, medically speaking?

A. He's a substance abuse counselor, licensed [10] substance abuse counselor.

Q. What kind of medical qualifications or trainings does he have?

A. I cannot speak for that. I never trained a licensed substance abuse counselor, per se.

Q. Well I'm curious. You know, you took his word for it that she had a seizure, right?

A. Yes.

Q. What qualifications did he have that made you feel comfortable in his diagnosis of her having a seizure?

A. He has had a great deal of experience working on susbtance abuse areas.

Q. Um-hmm.

A. And those people have seizures quite often.

Q. People that abuse substances have seizures?

A. Yes.

Q. How was she a danger to herself?

A. She was a danger to herself in that she would be around other people who may try to manipulate her one way or the other.

Q. How so?

A. Physically.

Q. What do you mean?

A. Well, they could approach her sexually and she'd not be aware of it.

[11] Q. Okay.

A. They might hurt her physically and she not be aware of it.

Q. Okay. Well, tell me a place that she could work that would be safer than a hospital for someone who has seizures.

A. I could tell you a number of places.

Q. Please.

A. She could be a good receptionist.

Q. What would stop somebody from trying to take advantage of her there?

A. The kind of people that we admitted on the unit would be of higher risk kind of people who would do unusual acts, and they have done it in the past.

Q. Well what kind of people did you have on the unit?

A. We didn't have any persons on the unit at that time when she was hired.

Q. Well what kind of people did you have on the unit that would be more dangerous than your average person?

A. They would be people who were under the influence of substances, illegal substances as well as alcohol.

Q. Well it was my understanding that the people in your unit would not be under the influence.

A. Well they would come into the hospital to be detoxed, so they would still have some influence of [12] illegal drugs and alcohol, even when they came to the unit.

Q. So you had people in the unit—these people weren't restrained when they were under the influence?

A. Oh, no.

Q. You had people on the unit that were under the influence of some kind of substance, illegal substance or legal substance, that was not restrained at all? They were free to roam around?

A. They were free to roam around, yes.

Q. Did you ever have an incident where any of your employees were attacked sexually?

A. Sexually innuendos, but not physically attacked, no.

Q. Besides somebody trying to take advantage of her sexually or to take—to physically hurt her, what other kind of danger was she in to herself?

A. Substance abuse technicians would take patients, as a group, out to smoke. They would take them to the park.

Q. Take them where?

A. To the park for walks in the park near the hospital. If she were in a place where we could not get appropriate medical attention to her that she might need—she might hit her head or anything of that nature.

Q. Did you have regular outings in the substance abuse [13] unit?

A. Yes, we did.

Q. Did you take people out by vehicle, patients?

A. We would take them if they—we would go and pick them up if we needed do that, or at times we would take them to their homes if we needed to do that.

Q. I'm talking about taking them out for activities.

A. We did not take them out for group activities while the unit was open, no, not in vehicles as a group.

Q. Was it a requirement that the addiction techs be able to do CPR?

A. Yes, the hospital required that.

Q. And did Allison go through the training for CPR?

A. I don't know. I don't remember.

Q. Let me show you a document I got from you or from your lawyer. I'll label this as Dixon Number 1. Did that come out of Allison's personnel file?

A. I don't know.

Q. Did you review Allison's personnel file?

A. Basically I did, yes.

Q. Okay. Well, that was provided to me by your attorney. It seems to indicate that Allison went through CPR training. Is that what you see?

A. I'm not surprised that she did.

Q. Okay. So if she went through CPR training, she was [14] trained in CPR. Is that what that certificate means?

A. That's what it means.

Q. Okay. I'm looking at some responses that you had in your answer to the original suit. It says under affirmative defenses, plaintiff was terminated because it was determined that based on her performance, she was unable to meet the established work standards for an addiction tech in the following particulars: An addiction tech should be required to, colon, one, administer CPR to patients in emergency situation; two, assist patients with activities of daily living, supervisor of groups of patients, escort patients to scheduled activities off the unit, parentheses, which often requires driving, closed parentheses; three, assisting in crisis intervention with patients including restraints, seclusion according to hospital policy and procedure.

Now, I'm going to start—it says, plaintiff was terminated because it was determined that based on her per-

formance, she was unable to administer CPR. Explain that to me.

A. I felt that if Ms. Deas had a seizure, she could not administer CPR to anyone.

Q. And that was based on her performance?

A. I felt that if Ms. Deas had a seizure and if it was [15] necessary to help another patient, she would not be available to do that.

Q. How many people are on a unit at any one time?

A. Oh, on an average it's 22, thereabouts.

Q. Employees on a unit?

A. Employees?

Q. Um-hmm.

A. It depended on the shift.

Q. Explain to me.

A. During the night shift, we don't have as many employees on the unit because we don't have as many activities on the unit as during the day.

Q. So how many would be on the night shift?

A. Possibly a nurse and a substance abuse tech.

Q. On day shift?

A. Depending on what period of the day, possibly a registered nurse, an LPN, a couple of techs in the morning and a receptionist.

Q. And in what ways was Allison a danger to the people on the unit?

A. I felt that if she had a seizure, during that time she could not be available to help other patients if we needed her to do that.

Q. What kind of situation would arise on that unit that—

[16] A. Other patients could have a seizure.

Q. Okay, what could Allison do if somebody was having a seizure?

A. She could report to the nurse that it was happening.

Q. Um-hmm.

A. She could be available to answer the phone if that were happening, to institute any other kind of medical

connections that we needed to make for the hospital, or even help to—in the transportation of the patient to another unit if we had to.

Q. So it's your opinion, as a doctor, that somebody who suffers from seizures shouldn't work in a hospital at all?

A. I felt that the type of unit that we had and the number of employees that we had that Allison Deas, in her condition, could not be a value to the unit and could be a danger to herself.

Q. Because of these things that she was unable to do, right?

A. Because during the time of the seizures, she would be unable to help out with other patients and put herself at risk being in the presence of patients that could take advantage of her.

* * * *

[22] Q. What kind of seizure do you call that? You just referred to it as a general seizure?

A. It's a general seizure, yes.

Q. So is that the two different types of seizures?

A. It can get—a lot of times it can be referred to as a jacksonian seizure.

Q. Okay.

A. Or grand mal seizure.

Q. And did you have any idea what was causing her seizures?

A. No, I did not.

Q. Did you ever ask her?

A. No, I did not.

Q. Did you ever ask her if she was on medication?

A. No, I did not.

Q. You just assumed they were out of control?

A. If I saw her have a seizure and then another employee told me that she—he witnessed a seizure in the same day, I felt they were out of control, yes.

Q. You never talked to her about any medicine she was [23] taking?

A. No, I did not.

Q. Didn't ask her if she was being treated by a doctor?

A. No, I did not. I did overhear her say that she was being treated by a doctor.

Q. When did she—

A. Yes, the same day.

Q. When?

A. She was talking to some employees and I heard her.

Q. Where was that?

A. On the unit.

Q. Who was she talking to?

A. I don't remember exactly.

Q. When did you make the decision to terminate her?

A. I don't know exactly when.

Q. Was it that day?

A. Probably later on that day, yes.

Q. You went and talked to Mr. Ferrelli about this, correct?

A. No, I didn't go and talk to Mr. Ferelli about this.

Q. Did you ever go and tell Mr. Ferrelli that you were letting Ms. Deas go?

A. I did not go and tell Mr. Ferrelli, no.

* * * *

[29] Q. I want to know what now that you have, as a Social Security disabilities examiner, when it comes to seizures and disability?

A. Seizures are considered controlled when they are one or two a month, as you said.

Q. That they're controlled if you have one or two a month?

A. Yes, that's considered good control.

Q. Okay. And if you had somebody who had seizures that were in good control—

A. It depends on—

Q. May I finish please, Doctor.

A. I'm sorry.

Q. If somebody had one or two controlled seizures a month, would that have been okay for her to work in the unit?

A. Again, I feel that this is a job sensitive area, and in an area like we were working in, no, I do not think that people who have seizures on that unit would be a good idea.

Q. Even if they're controlled or not controlled, right?

A. Well there is good control, yes.

* * * *

[31] Q. Did you have access to her medical records?

A. I could have obtained them, I think, if I wanted them.

Q. Where were they?

A. Where were they?

Q. Um-hmm.

A. I don't know where they were.

Q. You didn't know where the medical records were for your employees?

A. They were in the unit that kept them.

Q. What unit kept them?

A. Down in the administrative area.

Q. Do you know where the records were kept, the medical records for your employees?

A. Specifically, they were in the administrative area. Now specifically what room, no. I don't know.

Q. Okay, so the medical records on your employees, you don't know where they were; is that correct?

A. Not specifically.

Q. Okay. And you wouldn't have reviewed her medical records?

A. I felt that having two seizures in the same day wouldn't have mattered. I felt it was a dangerous situation.

* * * *

[37] Q. Did you have—

A. Helps plan and participates in activities, field trips and outings. That's as close as it comes.

Q. Okay. Was it a requirement for addiction techs to drive patients?

A. We were getting to that point, yes.

Q. Was it a requirement when Allison was hired?

A. I felt it was, yes.

Q. And did you make sure that everybody had a driver's license if it was a requirement? Was that a requirement to have a driver's license?

A. I don't recall as making it part of the requirement, but we wanted people to know how to drive, yes.

Q. But it was not a requirement?

A. We were moving in that—

Q. Was it a requirement when Allison worked there?

A. Again, we were moving in that direction because—

Q. Doctor, was it a requirement when she worked there?

A. We were moving in that direction, yes.

Q. So is your answer, no, it was not a requirement at that point?

A. I cannot remember whether we specified that one had to drive at that point in time.

Q. And whose vehicle would that person drive, their [38] own or a company vehicle?

A. We did not have a company vehicle at that time.

Q. So were they required to drive their own cars?

A. That—at that point in time, we weren't transporting any patients at that time.

Q. Did you have relationships or an arrangement with a credit union for employees of AATC to become members of a credit union?

A. Not to my knowledge.

Q. Did you have any benefits for employees at all?

A. Yes.

Q. What benefits did they have?

A. I don't remember specifically. That would be under the program director.

Q. Who was the program director?

A. I don't know if Phil Smith was the one at that time or not. Phil Smith would have been the program director, as I recall.

Q. You don't know what benefits at all your employees had?

A. No, I didn't handle that.

Q. Okay. Did you take care of the orientation for Ms. Deas?

A. Part of it, yes.

* * * *

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

No. 95-353-B-A

ALLISON DEAS

versus

RIVER WEST, L.P.,
ALTERNATIVE ADDICTION TREATMENT CONCEPTS, INC.,
STROTHER P. LINDSEY-DIXON AND PEGGY JARREAU

EXCERPTS FROM THE DEPOSITION OF ALLISON DEAS TAKEN ON JULY 22, 1996

* * * *

[22] Q. All right. And perhaps when I used the term epilepsy, I equate that with seizures. Do you have a condition which causes you to have seizures?

A. Yes, sir.

Q. And what is that?

A. A lesion in my left brain. There is no technical term for it.

Q. Okay. And that has been diagnosed?

A. Yes, sir.

Q. Okay. Tell me when it was first diagnosed.

A. It was first explained to me in 1983.

Q. And who explained it to you?

A. Dr. Dyken, D-y-k-e-n. I don't remember his first name.

Q. Do you remember where he was?

A. Mobile, Alabama.

Q. And what did he tell you about it?

A. He just explained that I had a lesion in my left brain. I said, "What is a lesion?" And from my understanding, it was something like a couple of blood vessels in the left brain that are connected at one spot.

* * * *

[24] Q. At the time this was first diagnosed, am I correct in understanding you had had a seizure and that is how you came to see Dr. Dyken?

A. I had seen another neurologist before Dr. Dyken. But—and it was because I had had seizures. But they had never been able to diagnose what the reason was.

Q. Do you remember that doctor's name?

A. No, sir.

Q. All right. How often—do you presently experience seizure problems?

A. No, sir.

Q. When is the last time you had a seizure?

A. The beginning of April of this year.

Q. Can you describe for me what happens to you, if you know?

A. I am not really sure.

Q. Do you—I don't want to say lose consciousness, but do you not have any awareness of what has happened to you once it is over?

A. Sometimes I do. Sometimes I don't.

Q. What do you know about it?

A. I have been told by people that are around me whenever I have one or had one they are very short in length, as far as under ten seconds usually, and that [25] I just stand there with a blank look on my face.

Q. Over the course of that condition since you were diagnosed in 1983, has the frequency of those seizures changed, stayed the same, lessened, increased?

A. Yes.

Q. In what way?

A. When I was much younger, they were much more violent. I had grand mal seizures.

Q. All right.

A. Then it slowed down a lot for a few years, and then with my doctor going and changing my dosage, trying to figure out what the correct dosage would be to stop them all together, my frequency started to pick back up, but it was very—it was with very small seizures, like the trance-like ones.

Q. Okay. I am going to go back and ask you a few questions because you have given me a lot of information just now.

Different people understand different things by the term grand mal seizures. Can you tell me what you mean by that; how would you describe a grand mal seizure?

A. Convulsions, biting on the tongue really hard, lose a lot of blood in the tongue, and they would be much longer.

* * * *

UNITED STATES DISTRICT COURT
D. KANSAS

No. 92-1456-PFK

DELORES A. CASTORENA,
Plaintiff,
v.
MARVIN T. RUNYON, JR., Postmaster General, and WILLIAM F. JONES,
Defendants.

May 23, 1994

MEMORANDUM AND ORDER

PATRICK F. KELLY, District Judge.

This matter comes before the court on plaintiff Delores A. Castorena's motion for reconsideration and motion to reject defendant Marvin T. Runyon's response to said motion as untimely. The latter motion will be addressed first.

Timeliness of Response

A party opposing a motion for reconsideration has 10 days in which to file a response. D. Kan. Rule 206(b). Castorena filed her motion on April 14, 1994, and Runyon filed his response on April 29, 1994. Castorena contends that even if the time frame for a response allowed for a Sunday, Runyon's response was due April 25, 1994. Castorena's contention fails to take into account Fed. R. Civ. P. 6(a), which provides in pertinent part:

> In computing any period of time prescribed or allowed by these rules, by the local rules of any dis-

> trict court, by order of court, or by an applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. . . . When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation.

Therefore, in computing the 10-day period, counting begins with April 15. The weekends of April 16-17 and April 23-24 are excluded from the computation. Additionally, April 27 is excluded because President Clinton designated the day a legal holiday in observance of former President Nixon's funeral. Thus, this court agrees with the defendant that his response was not due until April 29, 1994. Runyon's response was filed timely.

The plaintiff recently filed a request to withdraw her motion to reject Runyon's response to her reconsideration motion. The request is granted.

Reconsideration

Castorena files her motion for reconsideration pursuant to D. Kan. Rule 206(f), which states: "A party may file a motion asking a judge . . . to reconsider an order or decision made by that judge. . . . Such motion shall be filed within ten days after the entry of the order or decision unless the time is extended by the court." *See Prudential Sec. Inc. v. LaPlant,* 151 F.R.D. 678, 679 (D. Kan. 1993) ("a motion to reconsider is purely a creature of local rule and is not covered by any provision of the Federal Rules of Civil Procedure"). In *Van Skiver v. United States,* 952 F.2d 1241, 1243 (10th Cir. 1991), *cert. denied,* 506 U.S. 828, 121 L.Ed.2d 51 (1992), the Tenth Circuit Court of Appeals discussed motions to reconsider, stating:

> The Federal Rules of Civil Procedure do not recognize a "motion to reconsider." Instead, the rules allow a litigant subject to an adverse judgment to

> file either a motion to alter or amend the judgment pursuant to Fed. R. Civ. P. 59(e) or a motion seeking relief from the judgment pursuant to Fed. R. Civ. P. 60(b). These two rules are distinct; they serve different purposes and produce different consequences. Which rule applies to a motion depends essentially on the time a motion is served. If a motion is served within ten days of the rendition of judgment, the motion ordinarily will fall under Rule 59(e). If the motion is served after that time it falls under Rule 60(b).

(Citations omitted.)

Castorena's motion was filed within 10 days of the order.[1] Thus, it was filed timely under local rules. Additionally, for purposes of the federal rules, the plaintiff's motion would fall under Rule 59(e), a motion to alter or amend a judgment. *See Northern Cheyenne Tribe v. Hodel*, 851 F.2d 1152, 1155 (9th Cir. 1988) ("A motion for reconsideration of a summary judgment is appropriately brought under rule 59(e)."); *see also Koch v. Shell Oil Co.*, 1993 WL 393763, *1 (D. Kan. 1993). The standards applied to motions under D. Kan. Rule 206(f) or Fed. R. Civ. P. 59(e) are the same.

> It is the general rule that a motion to reconsider is the opportunity for the court to correct manifest errors of law or fact and to review newly discovered evidence. Appropriate circumstances for a motion to reconsider are where the court has obviously misapprehended a party's position, the facts or the law, or mistakenly has decided issues outside of those the parties presented for determination.

Foutty v. Equifax Services, Inc., 764 F.Supp. 621, 622 (D. Kan. 1991) (citations omitted); *see State of Kansas ex rel. Hayden v. United States*, 751 F.Supp. 1495, 1496 (D. Kan. 1990), *aff'd*, 953 F.2d 1392 (10th Cir. 1992);

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[1] The Memorandum and Order was filed April 4, 1994. Castorena filed her motion on April 14, 1994. See Fed. R. Civ. P. 6(a).

Renfro v. City of Emporia, Kan., 732 F.Supp. 1116, 1117 (D. Kan. 1990), *aff'd*, 948 F.2d 1529 (10th Cir. 1991); *see also Williams v. Boeing Military Aircraft Co., Inc.*, No. 88-1366, 1991 WL 97592, *1 (D. Kan. 1991). It is within the district court's discretion whether to grant a motion for reconsideration. *Hancock v. City of Oklahoma City*, 857 F.2d 1394, 1395 (10th Cir. 1988).

Castorena asks this court to reconsider its grant of summary judgment to the defendant. With regard to her discrimination claim based upon race/national origin, this court found the plaintiff failed to exhaust her administrative remedies. "The plaintiff's complaints concern the continuing effects of an alleged discriminatory action that existed before the relevant filing period." *Castorena v. Runyon, Postmaster General, & Jones*, No. 92-1456-PFK, slip op. at 11 (D. Kan. Apr. 4, 1994).

A brief review of the facts is helpful. Castorena worked for the United States Postal Service (USPS) in St. Louis, Missouri, from November 1968 until December 1971, at which time she resigned. She requested reinstatement several times, most recently in 1991 in Wichita, Kansas. The USPS in Wichita denied Castorena's request, relying in part upon an unfavorable termination evaluation by her former supervisor in St. Louis.

Castorena claims this court's ruling is manifestly unjust because the validity of her Title VII claim did not become apparent until 1991. She maintains that even though she was aware of her supervisor's alleged discriminatory treatment of her in 1971, she had no Title VII claim, and thus no basis upon which to commence administrative procedures, until 1991 when she learned of her former supervisor's negative termination evaluation and realized its impact upon her life.

The plaintiff is advancing the same arguments this court previously rejected. A motion to reconsider, under either D. Kan. Rule 206(f) or Fed. R. Civ. P. 59(e), does not

permit the losing litigant to rehash arguments previously addressed and rejected or to present new legal theories or facts that could have been raised earlier. *National Metal Finishing Co., Inc. v. Barclaysamerican/Commercial, Inc.*, 899 F.2d 119, 123 (1st Cir. 1990); *Comeau v. Rupp*, 810 F.Supp. 1172, 1175 (D. Kan. 1992); *Van Skiver v. United States*, 751 F.Supp. 1522, 1523 (D. Kan. 1990), *aff'd*, 952 F.2d 1241, 1243 (10th Cir. 1991), *cert. denied*, 506 U.S. 828, 121 L.Ed.2d 51 (1992); *Prudential Sec. Inc.*, 151 F.R.D. at 680.

Castorena also disagrees with this court's finding that equitable tolling was not warranted, claiming she had neither the capacity nor the information to invoke the administrative process prior to 1991. For support, she cites *Richardson v. Frank*, 975 F.2d 1433 (10th Cir. 1991), for the proposition that equitable tolling is sanctioned if the government misinforms the plaintiff about time limitations for pursuing administrative remedies. The plaintiff then asserts the USPS misled her by hiding the negative termination evaluation from her for almost 20 years.

Castorena's argument could have been raised earlier. Her argument also loses on the merits. The *Richardson* court stated the plaintiff must prove "he was misled and lulled into inaction despite his due diligence." 975 F.2d at 1437; *see Castorena*, slip op. at 11 (equitable tolling is appropriate if the employer actively deceives or misleads the employee or if the employer lulls the employee into inaction). The plaintiff is under the misapprehension the USPS was obligated to disclose the negative termination evaluation without a request for such information. There is no evidence the USPS hid the unfavorable termination evaluation from *Castorena*. There is no evidence the USPS misled the plaintiff, actively deceived her, or lulled her into inactivity in spite of her due diligence. In fact, the plaintiff does not allege she ever requested the evaluation. A mere allegation that the USPS hid the evaluation from her is not sufficient. *See Anderson v. Liberty Lobby,*

Inc., 477 U.S. 242, 256 (1986) ("a party opposing a properly supported motion for summary judgment may not rest upon mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial"). Equitable tolling is not warranted on the facts before this court.

Castorena also asks this court to reconsider its grant of summary judgment to the defendant with regard to her discrimination claim based upon disability, previously referred to as handicap. She claims this court grossly misapplied the law in requiring that she show her impairment had a substantial limitation upon one or more major life activities. In addition, the plaintiff claims for the first time that her mental impairment substantially limits her major life activities. Although not required to do so, this court will address the merits of her claims.

In this court's previous memorandum and order, the definition of disability was discussed:

> The [Rehabilitation] Act defines "individual with a disability" as "any individual who . . . has a physical or mental impairment which for such individual constitutes or results in a substantial impediment to employment." 29 U.S.C. § 706(8)(A) (1994 Supp.). The Code of Federal Regulations further explains: (a) Handicapped person is defined . . . as one who: (1) Has a physical or mental impairment which substantially limits one or more of such person's major life activities, (2) has a record of such an impairment, or (3) is regarded as having such an impairment.
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> . . . .
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> 29 C.F.R. § 1613.702.

Castorena, slip op. at 14-15. This court relied upon the Tenth Circuit Court of Appeals' construction of the statutory and regulatory framework: " 'The definition of a handicapped [disabled] person has two elements: first,

that one has, has a record of having, or is regarded as having a physical or mental impairment; and second, that that impairment substantially limits one or more major life activities.'" *Id.* at 15 (quoting *Welsh v. City of Tulsa, Okla.*, 977 F.2d 1415, 1417 (10th Cir. 1992)).

The plaintiff previously argued the definition of disability has three alternative prongs—impairment, record of, or regarded as—rather than the *Welsh* two-part test in which both parts must be satisfied. She again maintains that if an individual has a record of impairment or is regarded as having an impairment, the individual need not establish the impairment substantially limits major life activities. In her motion for reconsideration, for the first time, she cites case law in support of her argument. She contends *Southeastern Community College v. Davis*, 442 U.S. 397 (1979), and *School Bd. of Nassau County v. Arline*, 480 U.S. 273 (1987), do not require a plaintiff to establish her impairment substantially limits major life activities. In other words, *Castorena* asserts these cases stand for the proposition that as long as the plaintiff has a record of impairment or is regarded as impaired, the plaintiff does not need to show her impairment at present substantially limits major life activities in order to qualify as disabled under the Rehabilitation Act.

Castorena directs this court's attention to the statement in *Davis* that "[a] person who has a record of or is regarded as having an impairment may at present have no actual incapacity at all." 442 U.S. at 405-06 n. 6. The plaintiff also points out the *Arline* Court noted that "Congress expanded the definition of 'handicapped individual' so as to preclude discrimination against '[a] person who has a record of, or is regarded as having, an impairment [but who] may at present have no actual incapacity at all.'" 480 U.S. at 279 (quoting *Davis*, 442 U.S. at 405-06 n. 6). In a footnote, the Court explained the disability definition protects

> those persons who do not in fact have the condition which they are perceived as having, as well as those

> persons whose mental or physical condition does not substantially limit their life activities and who thus are not technically within clause (A) in the new definition. Members of both of these groups may be subjected to discrimination on the basis of their being regarded as handicapped.

Id. at 279 n. 4.

The thrust of the *Davis* case was whether the plaintiff was an "otherwise qualified" disabled individual. The question of whether the disability substantially limited the plaintiff's major life activities was not before the Court. Based upon the plaintiff's serious hearing impairment, Southeastern Community College (Southeastern) refused to admit the plaintiff in its nursing program. The plaintiff filed suit in federal court, alleging a violation of the Rehabilitation Act. The district court entered judgment for Southeastern, finding the plaintiff was not an "otherwise qualified" disabled individual because her disability prevented her from performing safely in the nursing program and in the nursing profession. The Fourth Circuit Court of Appeals reversed, concluding the district court should not have considered the plaintiff's disability in deciding if she was "otherwise qualified" for the nursing program. The court of appeals ordered Southeastern to reexamine the plaintiff's admission application without considering her hearing disability.

The Supreme Court reversed, reasoning that educational institutions are not compelled under the Rehabilitation Act to overlook an individual's disability or to make substantial alterations that allow participation of a disabled individual in federally funded programs. Rather, the Act only requires "that an 'otherwise qualified handicapped individual' not be excluded from participation in a federally funded program 'solely by reason of his handicap,' indicating only that mere possession of a handicap is not a permissible ground for assuming an inability to function in a particular context." 442 U.S. at 405.

In a footnote following the above quote, the footnote to which Castorena cites, the Court detailed the definition of disability. Following the quote upon which the plaintiff relies, "[a] person who has a record of or is regarded as having an impairment may at present have no actual incapacity at all," the Court stated: "Such a person would be exactly the kind of individual who could be 'otherwise qualified' to participate in covered programs. And a person who suffers from a limiting physical or mental impairment still may possess other abilities that permit him to meet the requirements of various programs." 442 U.S. at 405-06 n. 6.

The Arline Court addressed whether an individual with a contagious disease such as tuberculosis was disabled for purposes of the Rehabilitation Act, and if so, whether this disabled individual was "otherwise qualified" to be an elementary school teacher. The Arline plaintiff was released from her teaching position after suffering three tuberculosis-related relapses within 24 months. She brought suit in federal court under the Rehabilitation Act. The district court found the plaintiff was disabled, but concluded Congress could not have intended for contagious diseases to be included within the disability definition. The Eleventh Circuit Court of Appeals reversed, holding the Rehabilitation Act does not preclude coverage for individuals with contagious diseases. The court of appeals remanded the case, ordering further findings concerning whether the contagiousness of tuberculosis disqualified the plaintiff from being "otherwise qualified" and whether it was possible to make reasonable accommodation for her.

The Supreme Court affirmed. The Court discussed the amended definition of disability, including the quote upon which Castorena relies, but that quote must be read in context of the entire case. Following that quote, the Court began its analysis by noting the definitions of "physical impairment" and "major life activities" found in the Code of Federal Regulations (C.F.R.) are significant in determining if an individual is disabled.

Castorena claims the Supreme Court never analyzed whether the Arline plaintiff's impairment affected her ability to walk, see, hear, speak, breath, learning, or work—the definition of major life activities set forth in C.F.R. See 29 C.F.R. § 1613.702(c) (1993) ("Major life activities means functions, such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."). Although the Arline Court did not analyze the matter in depth, the Court concluded the plaintiff's prior hospitalization for her physical impairment established substantial limitation of her major life activities.

The Supreme Court then discussed contagiousness, concluding "[i]t would be unfair to allow an employer to seize upon the distinction between the effects of a disease on others and the effects of a disease on a patient and use that distinction to justify discriminatory treatment." 480 U.S. at 282. The Court reasoned:

> Nothing in the legislative history . . . suggests that Congress intended such a result. That history demonstrates that Congress was as concerned about the effect of an impairment on others as it was about its effect on the individual. Congress extended coverage . . . to those individuals who are simply "regarded as having" a physical or mental impairment. The Senate Report provides as an example of a person who would be covered under this subsection "a person with some kind of visible physical impairment which in fact does not substantially limit that person's functioning." S. Rep. No. 93-1297, p. 64 (1974). Such an impairment might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment.
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> . . . By amending the definition of "handicapped individual" to include not only those who are actually

> physically impaired, but also those who are regarded as impaired and who, as a result, are substantially limited in a major life activity, Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment.

Id. at 282-84. In a footnote, the Court further explained that "Congress plainly intended the Act to cover persons with a physical or mental impairment (whether actual, past, or perceived) that substantially limited one's ability to work." *Id.* at 283 n. 10.

This court does not agree with Castorena that Davis and Arline eliminate "substantial limitation of major life activities" as a requisite element of the disability definition in all situations.[2] The Code suports this court's position, providing:

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[2] Castorena also claims two opinions this court issued follow her interpretation of the disability definition set forth in *Davis* and *Arline*. In *Wallace v. Veterans Admin.*, 683 F.Supp. 758 (D. Kan. 1988), the plaintiff, a registered nurse, filed suit under the Rehabilitation Act after a VA hospital refused to hire her because she was a recovering drug addict. Castorena contends there are similarities between the *Wallace* plaintiff and herself. Castorena maintains the *Wallace* plaintiff, although drug-free for over nine months, "might be at risk of recurring drug addiction around narcotics." (Pltf.'s Memo, at 10.) Castorena also speculates the *Wallace* plaintiff's major life activities were not limited substantially by her addiction.) According to Castorena, she too is "at risk of bizarre behavior, without her medications and without the ongoing treatment." (Pltf.'s Memo., at 10.) Castorena's cites to the record do not support this statement. Although the letters from her social worker and psychiatrist attest to the fact she is taking psychotropic drugs and receiving counseling, the letters do not discuss what her condition would be without medication or counseling. Castorena's own deposition testimony was that she was told a couple of years before filing suit that her condition no longer necessitated medication or counseling.

In *Wallace*, which was decided before the Tenth Circuit's *Welsh* decision, this court stated without discussion that drug and alcohol

> (d) Has a record of such an impairment means has a history of, or has been classified (or misclassified) as having a mental or physical impairment that substantially limits one or more major life activities.
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> (e) Is regarded as having such an impairment means (1) has a physical or mental impairment that does not substantially limit major life activities but is treated by an employer as constituting such a limitation; (2) has a physical or mental impairment that substantially liimits major life activities only as a result of the attitude of an employer toward such impairment; (3) or has none of the impairments defined in paragraph (b) of this section but is treated by an employer as having such an impairment.

29 C.F.R. § 1613.702 (1993)

As set forth in this court's previous memorandum and order, the defendant "acknowledges Castorena has established some record of impairment if the facts are viewed in her favor." *Castorena*, slip op. at 15. The plaintiff's own deposition testimony stated such impairment did not

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addiction are statutorily defined disabilities. 683 F.Supp. at 761. The issue before the court was not whether the plaintiff had an impairment and whether that impairment had to limit substantially major life activities, but whether the plaintiff was "otherwise qualified" for the position. *Wallace* does not offer guidance for the instant case.

In *Nicely v. Rice*, No. 92-1240, 1992 WL 403091, *2-3 (D. Kan. Dec. 7, 1992), aff'd, 1 F.3d 1249 (10th Cir. 1993), the plaintiff's impairment was a partially fused right wrist and a fused right elbow. This court accepted that the plaintiff's impairment substantially limited his major life activites because his impairment precluded him from accomplishing daily hygienic functions. Castorena complains "[t]his relatively modest impairment does not 'hold a candle' to [her] psychiatric history, her repeated hospitalizations, and her occasional inability to care for her children, as well as continued dependence on psychiatric care and related drugs." (Pltf.'s Memo., at 12.) Castorena is comparing apples and oranges. Additionally, this court in *Nicely* cited and relied upon the *Welsh* court's two-element disability definition.

impede her ability to walk, see, hear, speak, breath, and learn or to care for herself and her children. Castorena insists this court should assume her impairment substantially limits her major life activities based upon her prior hospitalizations because, according to the plaintiff, the *Arline* Court held "a single hospitalization more than twenty years before was 'a fact more than sufficient to establish that one or more . . . major life activities were substantially limited. . . .'" (Pltf.'s Reply, at 4 (quoting *Arline*, 480 U.S. at 281)). Castorena's reading of *Arline* overlooks the Court's explanation that "Arline suffered tuberculosis 'in an acute form in such a degree that it affected her respiratory system,' and was hospitalized for this condition." 480 U.S. at 281. Furthermore, who qualifies as an disabled individual under the Rehabilitation Act is determined "on a case-by-case basis." *Welsh*, 977 F.2d at 1417. Castorena also argues this court should infer her schizophrenia substantially limits her major life activities based upon her being diagnosed as paranoid schizophrenic and upon having her children taken away from her in the past. Such an inference would entail ignoring the plaintiff's deposition testimony to the contrary. Pursuant to 29 C.F.R. § 613.702(d), the fact Castorena may have a record of an impairment does not bring her within the disability definition of the Rehabilitation Act because she has failed to establish her impairment substantially limits major life activities.

If this court should follow literally the definition of perceived impairment found at 29 C.F.R. § 1613.702(e), it is not clear which clause Castorena believes is appropriate for her situation. The plaintiff's arguments are general. In her response to Runyon's motion for summary judgment, Castorena cites to the entire definition of perceived impairment, but does not specify a particular clause, for her contention that the "USPS' unwillingness to proceed 'to take any chances' with [her] shows that the deciding officials don't trust her statements [even from mental health professionals] and are also 'regarding her' as men-

tally or emotionally impaired whether she is or not." (Pltf.'s Resp. to Defs.' Mtn. to Dism. or for Summ. Judg., at 28.) In the conclusion of her motion for reconsideration, the plaintiff maintains that "because USPS knew about her nervous breakdowns and paranoid schizophrenia, then [she] was 'regarded' as disabled." (Pltf.'s Memo., at 15.) In her reply to Runyon's response to her reconsideration motion, Castorena again argues the USPS regarded her as disabled because they knew about her history of emotional illness. (Pltf.'s Reply, at 9.)

This court questions the appropriateness of a literal adherence to 29 C.F.R. § 1613.702(e) because *Welsh*, the opinion in which the Tenth Circuit set forth its definition of disability upon which this court relied, involved a perceived impairment question. The *Welsh* plaintiff argued he had been denied employment as a firefighter because the City of Tulsa regarded him as having an impairment that substantially limited his ability to work as a firefighter. The Tenth Circuit was well aware of the definition of "regarded as having an impairment" found in C.F.R., having cited the definition two paragraphs prior to setting forth the court's definition of disability.[3] 977 F.2d at 1417. Even if this court disagreed with the *Welsh* court's construction of the statutory and regulatory framework for defining disability, this court is bound by Tenth Cir-

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[3] The regulations to which the *Welsh* court refers are found at 45 C.F.R. § 84.3(j) (Department of Health and Human Services; Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving Federal Financial Assistance), which uses almost identical language as found at 29 C.F.R. § 1613.702 (Equal Employment Opportunity in the Federal Government; Prohibition Against Discrimination Because of a Physical or Mental Handicap). *Welsh* was a case involving § 504 of the Rehabilitation Act, 29 U.S.C. § 794, and the regulations at 45 C.F.R. § 84 only construe § 504. This case involves § 501 of the Rehabilitation Act, 29 U.S.C. 791. Castorena agrees §§ 501 and 504 of the Rehabilitation Act "share a common definition of 'disability' for coverage purposes." (Pltf.'s Reply, at 4.)

cuit precedent. This court previously followed the *Welsh* two-element test for defining disability under the Rehabilitation Act in *Nicely*, No. 92-1240, 1992 WL 403091 at *2-3 (D. Kan. Dec. 7, 1992), *aff'd*, 1 F.3d 1249 (10th Cir. 1993). The Western District of Oklahoma also has heeded the *Welsh* two-element disability definition. *Bolton v. Scrivner, Inc.*, 836 F.Supp. 783, 787 (W.D. Okla. 1993).

Additionally, the plaintiff contends this court should give deference to the bench decision for the Equal Employment Opportunity Commission (EEOC) hearing. The administrative law judge concluded:

> While there is some question as to whether Complainant's diagnosed paranoid schizophrenia was shown to have sufficiently impaired a major life function to qualify as a handicap under the law, I am willing to assume that she meets the definition for a handicap and the Agency does not contend otherwise.

(Defs.' Mtn. to Dism. or for Summ. Judg., Ex. N at 6.) As the plaintiff notes, the defendant now contends otherwise. Runyon responds, explaining that postal employees conduct the EEOC hearing sans legal guidance. Runyon also points out Castorena's deposition, in which the essence of her testimony was that her impairment had no substantial limitation upon her major life activities, was taken after the EEOC hearing.

This court remains mindful of the social purpose behind the Rehabilitation Act. *See Wallace*, 683 F.Supp. at 760-61. The fact the Act is to be construed liberally does not mean plaintiffs need not satisfy the elements for bringing a claim under the Act.

There is no gross error in this court's application of the law of disability.

Plaintiff Castorena's motion for reconsideration is denied.

IT IS ACCORDINGLY ORDERED this 23rd day of May, 1994, that plaintiff Castorena's motion for reconsideration (Dkt. No. 20) is denied, and her motion to reject defendant's response to said motion as untimely (Dkt. No. 22) is withdrawn.